



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

MISC CIVIL APPLICATION NO. 62 OF 2014(O.S)

FATUMA MASHAKA.....PLAINTIFF

VERSUS

BATULBAI w/o BADRUDIN MULLA ADAMJI ANJARI.....DEFENDANTS

JUDGMENT

1. This is the Originating Summons brought pursuant to Section 37 and 38 of the Limitation of Actions Act (Chapter 22 Laws of Kenya) Section 3A and 63(e) of the Civil Procedure Rules and all enabling provisions of the law.

2. LET BATULBAI W/O BANDRUDIN MULLA ADAMJI ANJARI of Post Office Box Number 42052 Nairobi within 21 days after service of this Summons upon her enter appearance to this Summons which is issued on the application of FATUMA MASHAKA for ORDERS;

a) That FATUMA MASHAKA has become entitled by way of adverse possession to the title in all that parcel of land known as MN/V/227.

b) That FATUMA MASHAKA be registered as proprietor in common of MN/V/227 in place of Batulbai w/o Badrudin Adamji Anjari.

c) That the Commissioner of Lands through the Mombasa District Registrar of Titles do register FATUMA MASHAKA as proprietor of MN/V/227 Mombasa in place of Batulbai w/o Badrudin Adamji Anjari.

d) That costs of this suit be provided for.

3. The grounds are;

i) That the Defendant is registered proprietor of all that parcel of Land known as MN/V/227 Mombasa measuring 1.4 Acres or thereabouts hereinafter referred to as the "Suit land".

ii) That the Plaintiff/Applicant has acquired title to the said suit land by way of adverse possession following over 12 years of continuous and uninterrupted occupation and possession of the same since 1940's to date which occupation and possession is adverse to the Respondents' title.

iii) That the Defendants title to the suit land stands extinguished failing to interrupt the continuous and uninterrupted occupation and possession of the said land by the Applicant for a period of more than 40 years.

iv) That up to date, the Applicant continues to be in adverse possession of the suit land.

v) That in the premise, the Applicant should be registered as the proprietor of the suit land in place of the Defendants.

4. The Originating Summons is dated 20th March, 2014 and is supported by the affidavit of Fatuma Mashaka sworn on the 20th March, 2014 and filed in court on the same day.

5. The Defendant was duly served by registered post to the last known address. Another set of documents was forwarded by the Registrar of the court to the minister for foreign affairs for transmission through the diplomatic channels to the Indian High Commission to Kenya.

6. It was directed that the matter do proceed by way of *viva voce* evidence.

7. The Applicant/Plaintiff FATUMA MASHAKA, who testified on 2nd October, 2017 told the court that she got married to Hamisi Mwakindoo's grandson, a resident on the suit land. That since she got married she has resided there all this time. She is now about seventy (70) years old.

She produced a copy of title as exhibit P1. She also told the court she has been paying rates and rent. She produced a bundle of receipts as exhibit P2. She also produced a certificate of official search as exhibit P3.

She told the court that she has lived peacefully and uninterrupted on the said land for all these years. She prays that she be registered as the owner of the suit land.

8. I have considered the originating summons, the supporting affidavit and the annexures. I have considered the evidence tendered and the written submissions. The issues for determination are;

i) Whether the Applicant is entitled to be declared as proprietor of Plot No. 227/Section V/Mainland North which she has acquired by way of adverse possession.

ii) Whether she is entitled to be registered as the owner of the suit property.

iii) Who should bear costs?

9. In the case of *Kasuve –versus- Mwaani Investments Limited and 4 Others (2004) KLR 184* at page 188 it was held;

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

10. The Applicant told the court that she has been on the suit land for over 40 years. She told the court that she never used force to occupy the land neither has she used force to continually remain in possession to the date of filing the Originating Summons.

I am also guided by the cited case of *Teresa Wachuka Gichira –versus- Joseph Mwangi Gachira Civil Appeal No. 325 of 2003.*

11. The Applicant herein produced a copy of title and certificate of official search to show that the suit land is registered in the name of Defendant.

12. I find the Applicant has proved that she has been on the land *nec vi, nec clam, nec precario*. I am guided by the authority of *Francis Gichuru Kariri –versus- Peter Njoroge Maina, Nairobi Civil Appeal No. 293 of 2002* which approved the decision of the High Court in the case of *Kimani Ruchere –versus- Swift Rutherfords And Company Limited (1980) KLR* where Kneller J. held that;

“The Plaintiffs have to prove that they have used this land which they claim as of right *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion) so the Plaintiffs must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to attempt it by way of recurrent consideration.”

13. I have considered the evidence in totality. I find that the Applicant has satisfied the conditions set out above for the court to approve her claim for adverse possession. The Applicant's case has not been challenged.

14. I enter judgment on her favour as follows;

a) That a declaration is hereby issued that the Plaintiff/Applicant is entitled by way of adverse possession to be registered as the owner of the property known as Plot Number 227/Section V/Mainland North situated in Jomvu.

b) That the ownership rights of Batulbai w/o Bandrudin Mulla Adamji Anjari are hereby extinguished by virtue of the accrued right of adverse possession by the Plaintiff/Applicant.

c) That the Plaintiff/Applicant is entitled to be registered as the proprietor of Plot Number 227/Section V/Mainland North situated in Jomvu.

d) I make no orders as to costs.

It is so ordered.

DATED, and SIGNED at Mombasa on the 13th day of June, 2018.

L. KOMINGOI

JUDGE

DATED, SIGNED and DELIVERED at *Mombasa* on the 13th day of *June*, 2018.

A. OMOLLO

JUDGE